NON-PUBLIC CORPORATIONS AND ULTRA VIRES.

IN the early days of corporations, when all charters represented special grants by the legislative power; when the beneficiaries of the franchise were supposed to be chosen because of their special fitness to exercise the powers and to enjoy the privileges conferred; when the acceptance of the charter by these beneficiaries imposed a corresponding duty towards the State and the public, — it was stated to be a universal rule that the assumption or usurpation of a power not expressly conferred by the charter or necessarily to be implied from it subjected the corporation to a forfeiture of its charter by an appropriate proceeding on the part of the State. At the present time, special charters are the rare exceptions. General laws permit the incorporation of companies and the reservation of all or any of the powers that are possessed by natural persons. Any persons, with unimportant qualifications, however unworthy, and irrespective of their fitness to perform the purposes of the company, may associate in corporate form. Articles of incorporation are perfunctorily executed, and when the fee is paid and the articles filed, the corporation is entitled to recognition, generally without any discretion to the appropriate public officials as to the acceptance of the articles. But the rule is still commonly declared to be universal that the exercise of power not reserved in the charter exposes the corporation to *quo warranto* by the Attorney-General and a judgment of ouster.

In considering the application of this principle of forfeiture, for the exercise of powers not reserved, to the case of strictly private corporations, it should be premised that the discussion can have no interest in those jurisdictions where, by statute, it is expressly provided that the penalty for a usurpation shall be forfeiture either by or without office found. Such provisions become express conditions of the grant itself, and exclude all questions of power or expediency. It should also be understood that the questions under discussion are limited to the cases of strictly private corporations, that is to say, commercial corporations that do not even have a *quasi* public character. In other words, it is intended to exclude from consider-

ation all corporations created to carry out purposes which concern the public at large, and from which purposes the corporation does not derive any direct material gain, as well as commercial corporations like railway, banking, water, and lighting companies, which, though formed for their own gain, have powers, in the proper performance of which the public at large has a direct actual interest. Whatever the rule applicable to these may be, there is a special reason in such cases for conceding to the State both the restrictive control (*scire facias*) and the destructive function (*quo warranto*).

It may also be admitted that even in the cases of these strictly private commercial corporations any act done in excess of powers granted or any omission of a duty imposed, which affects the public at large or offends the spirit of public policy (for other reasons than simply because it is an excess of power or omission of duty), or that unfits them for the performance of public duties, if such a condition be conceivable in the case of such corporations, should give the State the right to interfere. As commonly stated, however, the doctrine is not so restricted.

Even in a comparatively recent case,[1] a very learned judge says of corporate grants, in what must have been a very carefully considered opinion, that they are *always* assumed to have been made for the public benefit, and that any conduct which destroys their normal functions must so far disappoint the purpose of their creation as to affect, unfavorably, the public interest. As to this, it may be said, however, that in view of the actual circumstances under which, as has just been pointed out, charters are now obtained, it requires a vivid stretch of imagination or the invoking of an unusually ingenious legal fiction to make out the presumption that franchises are granted for the public benefit in those cases where the corporation is organized for gain and for no public purposes. Certainly the charter is not *sought* for the public benefit in the case of strictly commercial corporations, and if it is granted for that purpose it must be admitted that our legislatures omit even the simplest safeguards to effecuate that purpose. It is begging the whole question proposed to be discussed to say that because a usurpation of power is without authority, and because the authority granted represents the will of the State, such usurpation affects the interests of the public.

But we undoubtedly have to deal with this popular notion insist-

[1] People *v.* North River Co., 121 N. Y. 582.

ing that even though the power usurped do not involve any moral turpitude or *malum prohibitum*, and even though the act done be pursuant to the expressed consent of every stockholder, and without prejudice to the rights of creditors, the penalty is still involved, the power of forfeiture always implied. Recent decisions involving the exact question are, of course, rare. When directors, stockholders, and creditors are satisfied, the violation of law is not likely to be brought to the attention of the Attorney-General. On the other hand, it is to be remembered that in the earlier times, as suggested by Brice, this principle was upheld and strictly enforced because the needy sovereign wanted funds, and when he failed to get them in sufficient quantity from the normal channels, he found a ready and never-failing resource in wealthy corporations who would not buy their peace, and who could, without much difficulty, be convicted of some improper proceeding or other.

At the same time, it may be confidently stated that there is no decision in recent times which, on the precise questions involved in it, is authority in support of the power of the State to act in such a case, either to restrain the wrongful act or to punish by ouster. *Dicta* to that effect are numerous enough, but concurrently with these we find evidences of protest, direct and indirect, against such interposition.

In the first instance, it may be said that the development of the doctrine of *ultra vires*, in its application to the enforcement of contracts made in excess of power, shows such a protest. The earlier decisions, still adhered to in many jurisdictions and of the most respectable authority, hold that no action can be sustained upon such a contract or in the face of a prohibitory statute, and that there is no estoppel upon the defendant, whether the corporation be complaining or defending, against setting up the want of power or statutory prohibition.

"All contracts made by a corporation beyond the scope of those powers" (enumerated in the charter and those fairly incidental) "are unlawful and void, and no action can be maintained on them in the courts, and this upon three distinct grounds: the obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. . . . A contract of a corporation which is *ultra vires* in the proper sense, that is to

say, outside the object of its creation as defined in the law of its organization, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." [1]

It will assist the consideration of this question of *ultra vires* to bear in mind one distinction, and that is, that there is nothing peculiar to corporation law about acts in contravention of public policy; that is to say, acts contrary to an express provision of law or contrary to the policy of express law, though not expressly prohibited or (otherwise) contrary to good morals. Such acts, when done by corporations, are unlawful and void, not because they are outside of the powers reserved by or granted to the particular corporation, but because they are unlawful by whomsoever done, whether by corporations or individuals. When, however, it is said [2] that public policy is concerned in the restriction of corporations within chartered limits, it may be urged that this is dragging this already too indefinite and therefore unsatisfactory expression (public policy) into an atmosphere too nebulous, even for something so essentially vague. The whole purpose of this discussion is to show that there is no such public policy involved in the case of non-public corporations. If the mere usurpation of power were against public policy in the sense in which this term is usually employed, any one participating in or contributing to the act would be wholly outside of the pale of the law, and we should not have the courts protesting that the plea must not be allowed to prevail when it would not advance justice. Certainly no such extenuation is made in favor of any other transactions forbidden by the policy of the law. As was said in Whitney Arms Co. *v.* Barlow,[3] "When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred," and which, therefore, shareholders can restrain, or for which they can call their directors to account, as for a breach of trust. "It seems to me far more accurate to say that the inability of such companies

[1] Central Transfer Co. *v.* Pullman Palace Car Co., 139 U. S. 24.

[2] See opinion of Judge Gray in Leslie *v.* Lorillard, 110 N. Y. 519.

[3] 63 N. Y. 61.

to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition making acts unlawful which, otherwise, they would have had a legal capacity to do." [1]

It is this distinction, showing the irrelevancy of the matter of public policy in cases of *ultra vires*, that presently leads the courts, even though, perhaps, unconsciously in some cases, to qualify the general rule as to the enforcement of contracts of corporations made beyond their powers. In this way we find the decisions first excepting the case of acts which, though within the powers granted, are performed for a purpose different from that prescribed by the terms of the charter. And as to such acts, it is said that if the party with whom the corporation deals does not know the purpose of the act, or does not know that it was not done for the purpose authorized by the charter, he shall have the same rights as if the purpose had been one for which the act was expressly authorized. And, in the same way, it is held that acts done by a corporation which presupposed the existence of other acts to make them *intra vires* are presumptive proofs that the latter acts, in fact, existed. When all is said, however, this is still giving validity to acts outside of the authority granted.

We then find a further development of the law arising out of the anxiety of courts to sustain agreements made outside of the corporate powers, but not in violation of any express statutory or charter provision. We are now told that a corporation is no longer the artificial being, "invisible, intangible, and existing only in contemplation of law,"—existing, if at all, only for the purposes of its creation, and not doing, in fact, what it cannot lawfully do. It is discovered that corporations permit torts, which, of course, is outside of their powers, that is to say, for which no authority has been conferred, but for which, in some way, responsibility must be located, punishment provided, and the injured party idemnified. Laws, too, are made for the punishment of crimes committed by corporations, although, of course, their charters do not authorize the commission of crimes.

Courts are called upon to deal with cases where *ultra vires* contracts are entered into and, as to the party dealing with the corporation, performed. The corporation has received certain ben-

[1] Lord Selborne, in Riche *v.* Ashbury Carriage Co., L. R. 7 H. L. 694.

efits, has refused to perform on its part, and when an action is brought against it on the contract it pleads the general issue or its equivalent in such a case that the attempt to make the contract in question failed because of lack of power in the corporation to make it. Such a state of things is, after a time, of course, found intolerable. As was said by Lord St. Leonards in Hawkes *v.* Eastern Co.,[1] "In my opinion, nothing can be more indecent than for a great company like this to allege, by way of defence, that a solemn contract which they have entered into is void on the ground of its not being within their powers." And yet all aboriginal notions about corporations precluded any remedy except *quo warranto* by the State. The more conservative courts insist, even at this late date, that the contract is void and unenforceable, but work out the money had and received or *quantum meruit* fiction so that justice may be done. In so doing, however, they recognize, as the true distinction in principle to be observed, that, if there be no wrong done to the public at large, the corporation must pay for what it has received; but that if there has been a so-called moral offence against the public, the inequitable advantage retained by the corporation in that relief is refused to the party who has dealt with it, unfortunate as such a condition may be, must yield to the higher consideration, and the public welfare must be vindicated as the supreme law. The State must hang the criminal even though the citizen lose his remedy; the lesser wrong must go unpunished that a public example may be made of the greater or more important wrong. "The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, in permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."[2]

The next step was inevitable. The wrong of the corporation in making the contract in excess of its powers is no greater than

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[1] 1 De G., M. & G. 760.

[2] Central Transport Co. *v.* Pullman Palace Car Co., *supra.*

that of the party with whom it deals, so far as he knows or is able to discover by a reference to the charter that the contract was unauthorized. "The doctrine of *ultrà vires*," says the Supreme Court of the United States, "when invoked for *or against* a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."[1] "The plea of *ultra vires* should not, as a general rule, prevail whether interposed for or against a corporation when it would not advance justice, but, on the contrary, would accomplish a legal wrong."[2] And there is abundant authority to the effect that the ends of justice would be defeated by allowing the party contracting with a corporation outside of its powers to retain any advantage from the contract without compensation. The courts differ as to whether or not it is the contract or the fictitious obligation that should be sued upon to work out these ends of justice, but the ultimate result sought to be attained is always compensation for the precise advantage received. It is a corollary to this doctrine that so long as the contract remains wholly executory on both sides, that is, where nothing has been done to call for compensation, no rights can be predicated upon the agreement; and that when it is wholly performed on both sides, the rights acquired thereunder shall not be disturbed.

But throughout the entire field of decisions covering the transactions of corporations involving the usurpation of power there is recognized, as determining the minimum of power on the part of courts to regulate these transactions, the matter of the public interest. If the act be *malum in se*, it is because of some standard of public morality established by the Church, by the Legislature, or generally by the state of civilization of the particular community in which the question is raised. If no public interest be affronted or the public conscience be not shocked, if the directors consent and no stockholder seasonably interfere, the usurpation may lay the foundation of rights which courts will recognize and enforce. But if all stockholders consent, either by preliminary approval, or by ratification, or by acquiescence, and no public interest be directly involved, why should not such acts be tested by precisely the same principles as those applicable to the acts of natural persons? After all, the strictly private corpo-

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[1] Ohio Company *v.* McCarthy, 96 U. S. 258.

[2] Whitney Arms Company *v.* Barlow, 63 N. Y. 61.

ration with which, as distinguished from the public and semi-public corporations, we are alone occupying ourselves, is nothing but a combination of individuals, made for the purprse of conveniently combining capital, with perhaps a limited risk, and otherwise no different from an ordinary copartnership, except that it is protected against dissolution by the death of a member. Why, then, should it be governed by a system of rules different in any particular from those that apply to the cases of ordinary copartnerships? The fact that the liability of stockholders may be limited is no reason for a different standard of obligation because credit is given to corporations with a perfect understanding of this limitation, and because the same limitation is permitted and expressly provided for in the case of special partnerships. Of course it is proper to say that so far as a copartnership has power to restrict the scope of its business by the terms of the partnership articles, so similarly it is to be said that as between the stockholders themselves, or the stockholders and the corporation, no corporation should engage in any enterprise not contemplated by the corporate charter, if for no better or other reason than that it is right to assume that the stockholder would not have joined the venture if it had not been for the character of the charter; that is to say, if it had provided for purposes other than it enumerates. An investor might be willing to engage in a mercantile enterprise of one kind where he might be unwilling to invest his moneys if he were not certain that they could not be diverted to a business of an entirely different kind. Shares in the stock of a land company involve a totally different kind of risk from those of a manufacturing or trading company. And similarly it might be said that the creditor had some status to restrain the unauthorized act on the theory that credit was given with knowledge of the purposes of the corporation, and his judgment of its ability to meet obligations based upon such purposes. But where the stockholder and creditor are satisfied, or do not complain, why should not the contract of the land company, made with reference to the business of manufacturing and merchandising, be enforceable for all purposes just like the contracts of a partnership for the purchase of real estate, sanctioned by all the partners, even though the partnership articles expressly prohibit such an investment of the partnership funds? "A corporation is not an agent of the State or, in any strict sense, of the stockholders; but it derives its powers from the State, and it may transcend those powers for purposes which, in themselves

considered, involve no public wrong. Contracts so made may be defective in point of authority, and may contemplate a private wrong to the shareholders; but they are not illegal, because they violate no public interest or policy. . . . There is no statute or rule of the common law by which they become public offences."[1]

I apprehend, therefore, that this doctrine of *ultra vires*, so far as applied to strictly private enterprises, except in cases where the public interest is directly affected, and affected injuriously, and in the case of the *malum prohibitum* or *malum in se*, which has nothing about it peculiarly applicable to the case of corporation law, and except as objected to by the stockholders themselves, has no place in the law, and that it is an anachronism, developed at a period when conditions were wholly different, charters a special privilege with the *delectio personarum*, and born chiefly of the cupidity of rulers who found in the dissolution of corporations and their punishment for usurpation of powers a means for enriching their own needy purses. If the reason for the rule be obsolete, the rule itself should go; not alone from our decisions, but from the few statutes which make the usurpation the *malum prohibitum*. The State has no interest in such transgressions by such corporations. It is not surprising, therefore, to find the latest commentator on the subject speak of a "new and growing doctrine," according to which the question of usurpation of powers is one which cannot be raised between the corporation and a private party, or between private parties, but only by the State in a direct proceeding for punishment or forfeiture.[2] The learned author implies his protest in the caution that this principle, if allowed to prevail, will practically obliterate "the so-called doctrine of *ultra vires*."

This brings us, then, directly to the question of the propriety or right of proceedings on the part of the State, either by *scire facias* to restrain the assumption of rights, or by *quo warranto* to forfeit the charter. Both proceedings may be considered together, because both involve the same principle. If it be right for the State of its own motion, with no direct interest in the matter, to destroy the corporation guilty of a legal wrong, it is proper for it to seasonably interpose to prevent the consummation of the wrong. And if the State cannot destroy the corporation because upon no sound, legal

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[1] Comstock, J., in Bissell *v.* Michigan Southern Co., 22 N. Y. 258.

[2] Thompson on Corporations, § 6033.

principle can any wrong be said to have been done to it, then the State has no justification to interfere at all, either by restraining or by punishing.

It may be admitted that in no case has it yet been directly decided that, even under the supposed circumstances, the State has not the power in question; although Judge Spencer, in so old a case even as People *v.* Utica Ins. Co.,[1] says that "many cases might be cited in which informations in the nature of *quo warranto* have been refused, where the right exercised was one of a private nature to the injury, only, of some individual. In the present case the right claimed by the defendants is in the nature of a public trust; they claim, as a corporation, the right of issuing notes," etc. But it appears to be equally true that no recent case can be found where the right under such conditions was sustained. In explanation of this, it may very properly be urged that as a practical question the State is not to be expected to assert its so-called sovereignty in cases of a purely private nature where no public interest is concerned. But the words of distinguished judges and learned commentators, with however little authority they may be speaking, are significant as to the soundness of the objection and the tendency of the courts.

We have seen how the doctrine of *ultra vires*, irrespective of the question of State interference, has developed or rather disintegrated. Of the original doctrine, that every act done outside of the powers expressly reserved or reasonably implied is of no effect whatever, there is nothing left except that the stockholder, and perhaps the creditor, by objecting in time can prevent the act, and that to the extent that an agreement has not been carried out it cannot be enforced except (no public interest being affected) to the extent that may be necessary to do justice between the parties. Indeed, it is not even certain that this much is left from the old rule, for we find the New York Court of Appeals[2] now holding that a corporation can, with the consent of its stockholders, usurp the power of executing accommodation paper from which the corporation receives no benefit. The court says, in effect, that it was no one's business, not even that of the corporation, so long as the stockholders, the beneficial owners of the property, by their conduct ratified the act. Out of this disintegration it is believed is springing the doctrine of non-interference on the part of the State.

[1] 15 Johns. 358.

[2] Martin *v.* Niagara Falls Co., 122 N. Y. 165.

Little over fifty years ago the Supreme Court of the United States,[1] speaking through Justice Story, said, that a corporation, by the very nature of its political existence, is subject to a forfeiture of its corporate franchises for wilful mis-user or non-user. And in an earlier case[2] the same court declared this right of forfeiture to be the common law of the land and a tacit condition annexed to the creation of every private corporation. In one of the best considered of all the leading cases on corporation law,[3] it is said that even where the agreement, though *ultra vires*, is so free from offence against express law on public morals that, being partly executed by plaintiff, it would be enforced, the State might still annul the charter. "Did the question now made arise upon an application of the stockholders and incorporators to restrain the corporate agents from applying the corporate funds to purposes foreign to the corporation . . . or on proceedings by the sovereign power to annul the charter . . . the rules of decision would be different from those which must prevail in the present action." And yet in that case the corporation had not a single public aspect, nor did the acts complained of directly affect a single public interest.

The limitations under discussion begin to be considered in connection with State proceedings against *quasi*-public corporations. "To establish it as a principle that no information can be granted in cases of what the counsel call private corporations might lead to very serious consequences."[4] But the serious character of the consequences is not made very plainly to appear. There is nothing but the matter of determining what is a private corporation. In Attorney-General *v.* Petersburg R. R. Co.,[5] Ruffin, C. J., says that with respect to the interest of the public in the performance of duties implied from the nature of the franchise granted "we should be inclined to allow that only such acts or omissions would be destructive of the charter as concern matters which are of the essence of the contract between the State and the corporation;" but that when the charter imposes a duty to be performed, "not merely to the citizen but to the sovereign itself," forfeiture may be adjudged.

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[1] Mumma *v.* Potomac Co., 8 Pet. 287.
[2] Terrett *v.* Taylor, 9 Cranch, 43.
[3] Whitney Arms Co. *v.* Barlow, 63 N. Y. 61.
[4] Tilghman, C. J., in Com. *v.* Arrison, 15 S. & R. 127.
[5] 6 Ired. L. 456.

Instead of the inevitable penalty, that is to say, instead of being a question of the arbitrary power of the State, it begins to be said that the wrong itself must be *so grave* as to require the application of the severe remedy by judgment of forfeiture, and that courts may *exercise their discretion* in deciding whether or not a corporation ought to be dissolved for doing unauthorized acts.[1] This consideration should be invoked to cover the cases of the corporations already referred to,[2] as not strictly public, in that they are not organized exclusively for the public welfare, but which, while organized for commercial purposes and for their own emolument, still exercise powers in which, by their very nature, the public has not only a potential but an actual and necessary interest. These are the commercial corporations which are organized, and generally obliged, to serve the public at large. In those cases in which the public interests are involved with private, the courts must exercise this so-called discretion in favor of the public interests. The powers exercised by such corporations, being public uses, are generally accompanied by the right to exercise the State's privilege of eminent domain, by which property is forcibly taken from its owners, and there is secured to such corporations a species of special privilege or monopoly which, in turn, subjects them to a special supervision or control to prevent an abuse of this high prerogative. As to such, "the power both of determination and enforcement is necessarily vested in State authority." [3]

This concession of discretion to the courts opens wide the door for the contention that has been urged. The power is no longer hard and fast; the wrong must be grave, and the courts may exercise their discretion. Can it be fairly said that the wrong is so grave against the public, appearing as complainant in the proceeding by their Attorney-General, when the public is not affected at all by the usurpation, and no direct injury has been done to the community at large, unless it be the unsubstantial one of the affront to its majesty by the violation of a duty which exists, if at all, only by fiction of law. "The State," says Justice Matthews, in N. O. Co. *v.* Ellerman,[4] "has a legal interest in preventing the usurpation and perversion of its franchises because it

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[1] See cases cited in Morawetz on Corporations, § 1028; Clark on Corporations, p. 237.

[2] See Miners Ditch Co. *v.* Zellerbach, 37 Cal. 543.

[3] Railroad Commrs. *v.* Portland Co., 63 Me. 269.

[4] 105 U. S. 166.

is a trustee of its powers for uses *strictly public.*" Then may it not be said conversely that if the power usurped be a strictly private use, and not a public one at all, that the usurpation or perversion is only a private and not a public wrong, if any, and therefore no concern of the public or the State?

In Bissell *v.* Mich. So. Co.,[1] Selden, J., says that there is neither occasion for nor propriety in a resort to proceedings by *quo warranto* for any mere private purpose, and that nothing is hazarded in saying that such is not the nature of this proceeding. While this assertion is made for the purpose of declaring the doctrine that every assumption of corporate power is a wrong done to the public, the form of the assertion is significant at this early stage. The learned judge may be wrong in calling every usurpation a public offence, and right in restricting the office of *quo warranto* to the protection of public interests. He certainly is sound in pointing out, as he does, how ample for the protection of shareholders or other private interests are the ordinary equitable remedies.

Brice in his admirable work on Ultra Vires, in enumerating the instances in which the Attorney-General may sue, and after saying that he may, when a corporation has been created to carry out public objects and is doing acts prejudicial to such objects, or when it holds property for public purposes and is committing a breach of the trust involved, or when it is doing acts generally detrimental to the public welfare or hostile to public policies, adds: "Whether the cases can be considered to have laid down the principle that, wherever a corporation commits an *ultra vires* act, the Attorney-General may interfere, is perhaps doubtful. . . . It is, therefore, submitted that the wrongful act or misuse of powers to justify the interference of the Attorney-General must, in addition, concern the public." But he admits that there are "decisions, or at least *dicta*," which lend countenance to the right of the Attorney-General to proceed, even though no definite injury is shown or likely to be done to the public.

Cook in his work on Stockholders[2] says that the theory that corporations have no powers outside of the charter is no longer "strictly applied" to private corporations. "A private corporation may exercise many extraordinary powers, provided all of the stockholders assent and none of its creditors are injured. There

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[1] 22 N. Y. 289.

[2] § 3.

is no one to complain except the State, and the business being entirely private, the State does not interfere." That is perhaps not the same thing as saying that the State *cannot* interfere. The author cites no authority for this statement except Kent *v.* Quicksilver Mining Co.,[1] where Judge Folger says *obiter*, that a corporation may do acts not illegal *per se* or *malum prohibitum* (which we have seen to mean expressly prohibited), though there is want of power to do them. "They may be made good by the assent of stockholders so that strangers to the stockholders, dealing in good faith with the corporation, will be protected in a reliance upon those acts." It was probably not meant that stockholders could confer powers not conferred by the charter, but that, by express assent, ratification, or laches, they could estop the corporation from asserting any lack of power. It is significant to note the further words of the court in speaking of the usurpation. "That was not a public evil: it was a wrong that affected private persons only, and one which they might assent to."

Thompson on Corporations, who writes of the present time, says[2] that the State will not interfere where no public question is involved. "In short, if the unauthorized acts affect merely the stockholders and creditors, and they have adequate legal or equitable remedies, the State will not interfere." It is to be noted that the learned author, like Cook (*supra*,) does not say "cannot," but "will not," and he may be speaking of the practice of Attorneys-General rather than their powers. He might probably have gone so far as to say that when, *in such cases*, the power to enforce forfeiture is not expressly conferred by statute, the power does not exist.

Judge Putnam, in Oliver *v.* Gilmore,[3] in speaking of the non-user of powers, says that a corporation "instituted for private trading or manufacturing purposes and owing no special duty to the public, can ordinarily limit or entirely omit the exercise of its corporate powers, and is no more held than an individual to proceed at a pecuniary loss with its intended operations." This might be said to be coquetting with the "new and growing doctrine," although there is a substantial distinction between non-user and mis-user even in the case of private operations.

In People *v.* North River Co., *supra*, where ouster was adjudged, Judge Finch points out the very essence of the decision

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[1] 78 N. Y. 159. [2] § 6034. [3] 52 Fed. Rep. 562.

when he says that, "to justify forfeiture of corporate existence, the State, as prosecutor, must show, on the part of the corporation accused, some sin against the law of its being which has produced or tends to produce injury to the public. The transgression must be such as to harm or menace the public generally, for the State does not concern itself with the quarrels of private litigants. It furnishes for them courts and remedies, but intervenes as a party only where some public interest requires its action."[1]

Finally, may it not be said that in the case of those commercial corporations which, in everything but form, are substantially ordinary trading partnerships, with power of succession, no one should be heard to complain of usurpation but creditors who are injured, or stockholders; that whether these complain or not, the State should not interfere, because in fact only private and not public interests are affected; that at least this should be so where charters are granted under general laws that would have permitted the power, that has been usurped, to have been originally reserved, if such had been the pleasure of the incorporators; and that, finally, the State should not be said to have a power which, if it did exist, should not be exercised. The purpose of this superficial discussion has not been so much to state the law as to anticipate its future; but it may, perhaps, be fairly said that enough has been pointed out from the books themselves to justify the prophecy.

Jesse W. Lilienthal.

[1] State *v.* Minnesota Co., 40 Minn. 213, acc. "Acts *ultra vires* are not necessarily a mis-user of franchises such as will warrant their forfeiture." And in Leslie *v.* Lorillard, *supra*, it was said that when corporations "act in excess of their powers, the question will be, is the act prohibited as prejudicial to some public interest, or is it an act not unlawful in that sense, but prejudicial to the stockholder."